N.R. Automotive, Inc., d/b/a Metro Toyota *and* Local Lodge 447, District Lodge 15, International Association of Machinists & Aerospace Workers, AFL–CIO. Case 2–CA–25976

July 31, 1995

DECISION AND ORDER

BY MEMBERS STEPHENS, COHEN, AND TRUESDALE

On May 18, 1994, Administrative Law Judge Steven B. Fish issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.[1]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, N.R. Automotive, Inc., d/b/a Metro Toyota, New Rochelle, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] We agree with the judge that it is appropriate to order the Respondent to bargain with the Union and to cease and desist from recognizing United Service Workers of America Local 355. In so doing, however, we do not rely on his analogizing Local 355's standing to that of the unlawful employee involvement committee found in *U.S. Marine Co.*, 293 NLRB 669, 688 (1989), enfd. 916 F.2d 1183 (7th Cir. 1990), enfd. en banc 944 F.2d 1305 (7th Cir. 1991).

Eric H. Brooks and *James G. Paulsen, Esqs.*, for the General Counsel.

Perry S. Heidecker and *Robert F. Milman, Esqs. (Marshall M. Miller Associates, Inc.)*, of Lake Success, New York, for the Respondent.

William Rudis, Grand Lodge Representative, of Stanford, Connecticut, for the Charging Party.

DECISION

STATEMENT OF THE CASE

STEVEN B. FISH, Administrative Law Judge. The trial of the above case was held before me on November 8, 9, and 19, 1993, in New York, New York. The complaint which issued on March 16, 1993, amended on October 7, 1993, and again at trial, alleges in substance that N. R. Automotive, Inc., d/b/a Metro Toyota (Respondent) violated Section 8(a)(1) and (5) of the Act by refusing to recognize and bargain with Local Lodge 447, District Lodge 15, International Association of Machinists & Aerospace Workers, AFL–CIO (the Union, Charging Party, or Local 447) as the successor to Tri-Star Automotive Group (Tri-Star), Section 8(a)(1) and (3) of the Act by the refusal to hire James Hession and Leonard Murray because of their activities on behalf of the Union, and Section 8(a)(1) and (5) of the Act by refusing to bargain with the Union concerning its refusal to hire Hession and Murray, and the reduction in the size of the unit.

Briefs have been filed by the General Counsel and Respondent and have been carefully considered. Based on the entire record,[1] including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Respondent is a corporation engaged in the retail selling, leasing, and servicing new and used automobiles at a facility in New Rochelle, New York. Based on a projection of its operations since August 18, 1992,[2] Respondent, in conducting its business operations, will annually derive gross revenues in excess of $500,000 and since August 14, 1992, has produced goods and supplies directly from suppliers located outside the State of New York valued in excess of $5000. It is admitted and I so find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

I also find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

For many years the Union had been the collective-bargaining representative for employees in a unit of service shop employees employed at 47 Cedar Street, New Rochelle, New York, by various employers including Crabtree Toyota and Tri-Star Automotive Group. A collective-bargaining agreement was executed by Tri-Star and the Union effective from September 1, 1990, to August 31, 1993, which contained a union-security clause, as well as a clause providing that if layoffs or reductions in force are necessary, Tri-Star ''shall lay off . . . in accordance with the principles of seniority.''

Tri-Star was owned by Stewart and Kit Watson and was supervised by Charles Wilk, its corporate vice president. During the summer of 1992, and prior to its last day of operation on August 14, Tri-Star employed 15 unit employees, who are referred to as mechanics or technicians. They included James Hession who was the shop steward for Local 447, and Earnest Sacarello who was assistant shop steward.

Hession was the shop steward at the facility since 1980. Hession in that connection participated in negotiations along with Union Agent Otero and other members of the negotiation team, which also included Assistant Steward Sacarello.

Hession never filed any grievances on behalf of any employees during his tenure as shop steward. He did become involved with a grievance filed in 1980 against Crabtree con-

[1] While every apparent or nonapparent conflict in the evidence may not have been specifically resolved herein, my findings are based on my examination of the entire record, my observation of the witnesses' demeanor while testifying, and my evaluation of the reliability of their testimony. Accordingly, any testimony which is inconsistent with or contrary to my findings is hereby discredited.

[2] All dates herein unless otherwise indicated are in 1992.

cerning the layoff of employees. Tri-Star and subsequently Respondent's service manager, Mickey Blank, was not employed by Crabtree at that time.

In December 1991, the employees of Tri-Star who were called into a meeting by the general manager, who told them that as of January 1, 1992, the Company did not want to pay for health benefits any longer, and that the employees would have to pay for it in its entirety. Hession and Sacarella both protested on behalf of the employees that there was a contract in existence and Tri-Star could not discontinue paying. After the meeting, Hession called Union Business Agent Otero, who came down, spoke to someone, and reported to Hession that the matter was straightened out and employees would continue to receive coverage paid for mainly by Tri-Star.[3]

There is no record evidence that Blank was aware of this incident, and he denies being aware of any plan or attempt by Tri-Star to eliminate medical benefits, other than its decision detailed below to terminate dental benefits.

Sometime in early 1992, Tri-Star which had been experiencing financial difficulties filed a petition for bankruptcy under Chapter XI of the Bankruptcy Code. Tri-Star continued to operate the business after the filing, and for the most part complied with the terms of the collective-bargaining agreement with the Union.

Don Lia, an experienced automobile industry executive, became interested in acquiring the assets of Respondent, as well as other dealerships owned by the Watsons. On February 14, 1992, Lia and Tri-Star entered into a dealer/purchase agreement for the sale of Tri-Star's Toyota assets, which includes the facility at 47 Cedar Street, New Rochelle, New York, and the machinery, equipment, parts, and supplies at such facility.[4]

On April 29, Respondent filed for incorporation with the New York Department of State as N.R. Automotive, Inc. On May 11, it filed a certificate of assumed name with the same agency to utilize a d/b/a of Metro-Toyota.[5] On May 22, Tri-Star and Respondent executed a first amendment to the dealer/purchase agreement which set a closing deadline of July 10. On May 29, the bankruptcy court issued an order approving the dealer/purchase agreement and authorizing the sale.

Wayne Siegel was employed by Don Lia's corporate management company, and as of mid-May 1992 was appointed vice president of Respondent by Lia. At that time, Siegel was sent by Lia to oversee operations at the Tri-Star premises. According to Siegel, this was done at the insistence of Chemical Bank as a condition of continuing to fund Tri-Star during the interim period, before Respondent assumed complete control of the facility.

While at the facility, Siegel was present for 5 days a week and at least 8 hours per day. Siegel insisted that he had no supervisory or managerial authority concerning the Tri-Star operations during this period of time, and that he was there solely to observe what was going on to satisfy the Bank. Siegel however added that the bank did not have faith that Tri-Star in its condition ''would run the way that they would like it to run, so we were there really to observe how they were operating things and making sure that things were taken care of on a day to day basis.'' Siegel also conceded that he was there to make sure that ''whatever financial policies could be put in place to at least limit the loss that would take place.''

During this period of time (May through August 14) Siegel was being paid by Lia or through Lia's Company and he reported regularly to Lia as to what he had found out about Tri-Star's operations, including where expenditures were excessive and areas where expenditures could be reduced. Interestingly, although Siegel was at the premises, allegedly at the insistence of Chemical Bank, he admits that he made no recommendations to, nor did he have any communications with, the bank during this period of time. According to Siegel, the bank ''just wanted to know that an automobile person was there conducting business the way an automobile dealership should operate, not that it was haphazard.'' Finally, Siegel had been told by Lia that when the closing was held, and Respondent commenced operating the business, that he would be vice president and in direct charge of the day-to-day running of the operation.

Although as noted above, the closing of the sale was scheduled for July 10, the closing date was postponed. The record does not disclose when or why or if the closing was rescheduled, or what new date if any was agreed on for the closing, prior to July 10.

On July 8, the New York State Department of Taxation and Finance issued a certificate of authority to Respondent to collect sales taxes.

At some point prior to July 13, Tri-Star eliminated dental coverage for all of its employees. The dental coverage was a self-insured plan for all of Tri-Star's employees, including supervisors and nonunit personnel, which Tri-Star provided, but for which employees contributed a portion of their salaries to the plan. The collective-bargaining agreement between Tri-Star and the Union does not mention a dental plan, but does refer to the fact that all employees covered by the contract shall be eligible to participate in the Tri-Star welfare and medical plans. It appears that the dental plan referred to was part of the Tri-Star medical and welfare plan. When employees were informed about the loss of their dental coverage, several of them complained about it to Mickey Blank, Tri-Star's service manager, who himself had his dental coverage ended as well. Blank inquired of Chuck Wilk about the matter, and was informed that after Tri-Star had filed for bankruptcy, employees had taken advantage of the plan, apparently trying to make sure to get their dental work done before the plan was ended. Therefore, Wilk explained that since the dental plan was self-funded, it had simply ran out of money, and consequently the employees no longer were covered for dental claims. Wilk also made a similar explanation to Siegel about the elimination of the dental plan, prior to July 13.

Several employees also complained to John Otero, business representative of the Union, about the loss of their dental plan, and informed him that there was a new owner in the shop. Otero, on July 13, went to the facility and initially spoke to some employees. The employees confirmed that their dental coverage had been eliminated and that they thought that there was a new owner up there. The employees

[3] As will be detailed more fully below, employees did contribute a small amount of money toward dental coverage.

[4] Lia also agreed to purchase eight other dealerships operated by the Watsons.

[5] Lia was and is the president and treasurer of Respondent.

did not mention the name of the new company, but did make some reference to the name Don Lia.

Otero then asked Blank if he could speak to Wilk. Blank replied that he should speak with Wayne Siegel because he was the new owner. Otero then went upstairs and met with Siegel in what had formerly been Wilk's office.

Otero introduced himself as the business representative for the Union, and stated that he represented the employees in the shop. Siegel replied that he was the general manager of Metro Toyota, and that he thought that Metro Toyota was going to take over the dealership in a week or two. Otero asked Siegel if Respondent would recognize and honor the Union's collective-bargaining agreement. Siegel answered that he would honor the contract, but that he couldn't honor the seniority clause. Otero responded that the Union would be willing to negotiate something to help him operate his business, but he couldn't give up the seniority clause.

Otero then asked if the employees would be receiving their vacations or vacation pay. Siegel responded that Tri-Star was going to pay the employees what they were owed for vacation, and that after Respondent took over, he would honor the employees' requests for time off, without pay. Otero also inquired about the dental plan being discontinued. Siegel explained that when Tri-Star announced its bankruptcy, everybody started using the plan, and the self-funded plan had run out of money. Otero suggested that the Union's dental plan be instituted. Siegel asked to see a copy of the dental plan and Otero agreed to send it to him. Finally, Otero asked why the demo plan had been discontinued. Siegel replied that there was a ''big hit'' on it, but that they intended to reinstitute the plan.

My findings above with respect to the July 13 conversation between Siegel and Otero is based on a compilation of the credited testimony of these two witnesses. For the most part, I credited Otero's version of the discussion, particularly in regard to the main point in dispute between the two witnesses, i.e., whether Siegel agreed to honor the Union's contract, with the exception of the seniority clause. I have credited Otero as detailed above that Siegel did so agree, contrary to Siegel's testimony that since he didn't know when or if Respondent would close, he did not and would not have been in a position to make any commitments about a contract. I note, however, that at that time a number of steps had been taken and papers filed toward the finalization of the sale, and indeed Siegel concedes that by early August, he had been told of a firm closing date of August 17. Moreover, Blank had introduced Siegel as the new owner. In these circumstances, I believe that Siegel on July 13 was fairly certain that the sale would be effectuated, and that he would be likely to discuss contractual terms or other matters with Otero. Indeed, Siegel does not deny that he discussed vacation pay and demos with Otero. He also admits that he explained to Otero why the dental plan had been eliminated, and more importantly asked Otero to send him a copy of the Union's dental plan for his review. These actions do not evidence an employer uncertain about whether it was going to take over, as Siegel so testified. Finally, the Union's subsequent letter to Siegel, dated August 20, which confirms Otero's account of the July 13 conversation was not responded to nor disputed by Siegel. It is noteworthy that by that time (August 20), the IAM contract with Tri-Star had been as detailed infra set aside by the bankruptcy court, but was still in effect on July 13. In my view, Siegel was well aware on July 13 that Tri-Star would be seeking to have its contract with the Union set aside, prior to the closing, and that his tentative agreement to honor the contract (except for the seniority clause) was meant to forestall the Union from expressing any opposition to the court's rejection of the agreement.

Accordingly, as set forth above, I credit Otero's version of the conversation with respect to these matters.

On July 17, the New York State Department of Motor Vehicles issued an official business certificate, registering Respondent as a new-and-used vehicle dealer.

During the first week in August, Lia informed Siegel that all problems concerning the sale had been worked out, and the closing was scheduled for August 17. Siegel then informed Blank of the closing date and confirmed his earlier intention to retain Blank as service manager at that time.[6] Siegel asked Blank how many technicians he believed Respondent would need to run an efficient and profitable service department. Blank responded that he felt that 12 technicians would be adequate. Siegel instructed Blank that it would be Blank's decision about how many employees would be hired, as well as which employees from Tri-Star would be selected.[7]

Shortly thereafter, but still during early August, Blank called a meeting of all bargaining unit employees. He informed the employees that a new owner, Don Lia, would be purchasing the dealership under the name of Metro. Blank assured the employees that everything including benefits would be the same under the new owner, except for the name on the building. Blank told the employees that they need not worry about their jobs because everyone would be retained and be employed when the new owner took over. Blank reminded the employees that they had gone through the same problem when Crabtree was taken over by Tri-Star, and they would be putting Tri-Star into Metro, ''no difference.'' Blank added, ''I'm going to be here next year; we're all going to have a job.''

On August 13, Blank called another shop meeting. He informed the employees that Friday, August 14, would be the last day as employees of Tri-Star, and that on Monday, August 17, Metro would be taking over. Blank again assured the employees that on Monday everything would remain the same, except for the name of the Company, and all current Tri-Star employees would be retained by the new owner. Blank added that on Friday, August 14 (the next day), the employees would be assigned to clean up the facility, so that it will look nice and clean when Metro took over officially on Monday, August 17.

On the same day of this meeting, August 13, the U.S. Bankruptcy Court Judge issued an order authorizing Tri-Star to reject all franchises, leases, and contracts, including specifically its contract with the Union, ''as of and conditioned upon the closing of the Sale of the Debtor's operating assets

[6] Siegel had indicated to Blank in a conversation in late June or early July that if Respondent took over, it intended to hire Blank as service manager.

[7] Siegel testified that he had in his observation of the operations of Tri-Star concluded that it was overstaffed with technicians, but that he did not share this conclusion with Blank, because he wanted Blank as his service manager to make his own determination on this subject.

to Don Lia on August 17, 1992, or such later date to which the closing is adjourned.''

Blank admitted that he had given assurances[8] to the Tri-Star employees that they would all be retained by the new owner, but claims that he did so at the request of Tri-Star's owners. Blank asserts that Watson told him that the business was probably going to be sold, but that the employees were nervous about their future and whether they would be retained by any new company, and it was affecting their work. Watson didn't want the employees to get scared and go look for other jobs and lose their chance to be employed by Metro. Watson therefore, according to Blank, instructed Blank to assure the employees that their jobs would be safe when a new owner comes in, so that the employees could get back to work and get their minds off the company's problems.

While Blank was assuring all the employees of Tri-Star of their continued employment when Metro took over, in fact he asserted, corroborated by Siegel that he recommended to Siegel and Siegel had agreed that Metro would hire only 12 of Tri-Star's technicians. Siegel left the decision as to which Tri-Star employees to retain entirely up to Blank.

With respect to the decision to retain only 12 employees, Blank had felt for a long time that Tri-Star was overstaffed with technicians, for the amount of service that was coming in, and he believed that 12 was an adequate number to run the operation. Siegel as noted concurred in Blank's judgment, particularly since he had reviewed Tri-Star's financial records, and noticed that Tri-Star had lost $1.2 million in 1991, and was losing $100,000 a month in 1992. Siegel also had concluded that his evaluation of service department records revealed a loss of $20,000 to $50,000 per month. Siegel also noticed, and Blank agreed that Tri-Star technicians had an excess of ''unapplied time.'' Unapplied time is the difference between clock hours and book hours. Book hours is the time specified in a manual for a specific job. If an employee produces fewer book hours than clock hours, he is still paid for all clock hours. Thus, ''unapplied time'' is considered a financial drain on the company, and something to be avoided if possible.

As to the decision of which technicians to let go, Blank testified credibly that he thought very carefully about the matter, and it was not an easy decision for him to make, since he worked with these employees for many years, and they all had families. Blank himself had been out of work in the past and it was not easy for him to tell someone to go home and tell their wife not to buy groceries.

Blank testified that he made his decision solely on the basis of his evaluation of the technical abilities of the employees. He concluded that employees James Hession, George Murray, and Esmond _____ would not be retained. While Hession and Murray were the most senior employees in the department, Blank did not consider seniority in his decision.

Esmond was a relatively new employee, who was employed primarily to work on Hyundai cars and had limited experience working with Toyota automobiles. Since Respondent would not be handling Hyundai cars, Blank decided that Esmond would not be rehired.

As for Hession, Blank testified that he believed that Hession was the least competent technician in the shop. Hession, although as noted, was one of the most senior employees in the department, he, in fact, had very little experience performing skilled mechanics' work during his years of service with Tri-Star and Crabtree. While Hession did some mechanics' work at Crabtree, by 1986 and 1987, when Blank was first employed at Crabtree, Hession was employed as a limo driver for Robert Crabtree, and he lost touch with working on cars.

When Crabtree sold the business to Tri-Star, Crabtree asked Stewart Watson to make sure that Hession, as well as two other longtime Crabtree nonunion employees, Tom Santoro, a porter, and Ann Conley, a secretary, remain employed, since they could not commute to Crabtree's new dealership in Connecticut.

Blank returned to work at 47 Cedar Street in January 1991,[9] Tri-Star was the employer and Blank again was employed as service manager. At that time, he noticed that Hession was employed as an ''A'' technician, which is the highest skilled category and requires the ability to diagnose and fix problems in transmissions, electrical, engine, and the suspension system. Blank asked Vance Cristifora, an official of Tri-Star what Session was doing working in the shop. Cristifora explained to Blank the above-described arrangement that had been worked out between Watson and Crabtree to keep Hession as well as Santoro and Conley employed by Tri-Star. Blank asked Cristifora what Hession does, particularly since Blank was aware that Hession had previously been employed as a limo driver. Cristifora informed Blank that Hession does oil changes, and P.D.I.'s, which is shorthand for predelivery inspections,[10] and that Blank should make sure that Hession makes his 40 hours per week. Blank asked if there was anything that could be done about it, and Cristifora replied that Watson takes care of his people, and that Hession didn't cause any problems, so ''just get it done.''

Subsequently, Blank complained to another official of Tri-Star that Hession was not performing mechanics work and recommended either termination or reduction of his grade. The official told Blank to live with Hession, but try to talk to Hession about going to Toyota school to improve his skills. Blank then asked Session about going to Toyota school to take some beginner courses in brakes and suspension so he could learn to perform work other than oil changes or unskilled P.D.I. work. Hession replied that if Toyota had a P.D.I. school he would go, but otherwise there was no use in going back to school, since he didn't want to learn anything else. There is no Toyota P.D.I. school, nor is there any need for one.

[8] While Blank admitted only to giving these assurances in his first conversation with employees, I credit employees Hession and Murray's mutually corroborative testimony that Blank gave similar assurances on August 13. Even as to that meeting, Blank while denying that he told employees that they would all be hired, admitted that he told them, that they would be cleaning up on Friday so that when ''we all come in on Monday,'' Lia would see a clean shop. Blank also conceded that he did not tell employees that some of them would not be retained on that date.

[9] He had left Crabtree voluntarily in 1987.

[10] It is undisputed that P.D.I. work requires little skill or experience, and consists of cleaning up the car, checking fluid levels, putting on hubcaps, and starting the engine.

Subsequent to this conversation, during monthly manager meetings, Blank would again bring up the problem of Hession and would simply be told to keep him on, don't worry about it, and that Hession was not hurting anybody.

As to Murray, Blank testified that, in his view, Murray was the second least competent technician in the shop, next to Hession. Although Blank admits approving a merit wage increase to Murray dated ''1/26/91,'' Blank testified that this action had no relationship to Murray's work abilities or performance. Blank explained that when he returned as service manager in January 1991, Murray asked him for a raise, and pointed out that everybody in the shop had gotten raises, except for him in the last 2 years. Blank replied that he could not make the decision since he had only been service manager for a few weeks, but he would look at Murray's personnel file and speak to Cristifora about it. Subsequently, Blank spoke to Cristifora after ascertaining that Murray had not been given a raise for a year or two, and Cristifora agreed to give Murray a raise for longevity. Blank did not explain why Respondent's personnel form checked off merit increase, rather than length of service increase, which also appears on the form.

Blank also decided that he did not wish to retain Santoro, the nonunit part-time porter, because he felt that his two full-time porters could adequately perform the work. Santoro mainly drove the customers to the train station, and although he had been working for 50 years at the facility, Blank decided that he was no longer needed, and the full-time porters could perform this work.

While Blank had tentatively decided by early August that Metro would not retain Hession, Murray, and Esmond, he did not definitely make up his mind until the evening of August 13. During the second week of August, he decided to solicit the opinion of his two service writers on the subject. The service writers, who were also going to be hired by Metro, were quasi-supervisors and nonunit personnel who had contact with the technicians and were familiar with their abilities. Blank explained to the service writers that when Tri-Star became Metro, he planned on employing 12 technicians, and since they now had 15, he planned on laying off 3 individuals. He stated that he wished to keep the 12 most qualified technicians, and asked the service writers to each make a list of the 12 employees who they felt were the most qualified. The service writers complied with Blank's request and each made a list. One of the service writers produced a list identical to Blank's; i.e., Hession, Murray, and Esmond as the three not to be retained. The other service writer also submitted a list without Hession and Murray, but differed on the third person, recommending that Esmond be retained and a different individual be let go. Blank discussed with the service writer the reasons why he felt Esmond should be kept on, rather than the other indiviual. Blank after this discussion, and after considerable thought and ''tossing and turning'' in his sleep, finally made up his mind on the evening of August 13, that Hession, Murray, and Esmond would be the three technicians to be let go by Metro.

On the morning of Friday, August 14, Blank informed Siegel that he would not be retaining Hession, Murray, and Esmond, as well as part-time porter Santoro. Blank did not inform Siegel that Hession was the shop steward, nor was Siegel aware of that fact. Blank testified unequivocally that neither Hession's shop steward position nor union activities played any role in his decision not to retain Hession as an employee of Metro.

Blank in the early afternoon called Esmond, Hession, and Murray into the office separately and notified them of his decision. He told Esmond that, as he knews, Tri-Star was closing and reopening on Monday as Metro. Blank stated that he was hired by Metro as service manager and that he didn't need the full complement of technicians. Blank informed Esmond that he has to lay off some people, and that Esmond was being let go because of his mechanical ability, more particularly that his experience was mainly with Hyundai cars, and his limited experience working on Toyota cars. Esmond accepted the decision without comment, and Blank indicated that he would help find Esmond a job.[11]

Murray was also told by Blank that Tri-Star was closing, Blank was service manager of Metro, and that he wouldn't be needing the same number of technicians. He told Murray that he and two others would not be retained and would be let go because of their technical ability. Blank added that if Murray needed a reference, he would give him one.

Hession was also called into Blank's office on that day. Blank told Hession that Metro had hired him as service manager and that he did not need the same number of employees as Tri-Star employed. Therefore, he explained that he was laying off three technicians based solely on technical ability, and that Hession would not be retained. Blank added that he needed 12 technicians that knew how to work on cars, and that he (Hession) did not work on cars, so he was not one of the people that Blank was keeping.

Hession then asked about the Union, and his seniority, and if that counted for anything. Blank replied that he was not considering seniority, since Tri-Star was going out of business. He (Blank) was the service manager of Metro and was hiring 12 people who can come in and work on cars.

Tri-Star had employed 60 employees in all departments. Metro hired 50 former Tri-Star employees. Therefore in addition to not retaining Hession, Murray, Esmond, and Santoro, Metro also did not rehire a payroll clerk, an office employee, and several parts and sales department employees.

On Monday, August 17, the facility opened for business under the name of Metro. Respondent commenced operations using the same machinery, equipment, parts, and supplies as was used by Tri-Star, and was engaged in the same type of business, i.e., sale, lease, and service of new-and-used cars. As noted, Metro hired 50 out of 60 of Tri-Star's employees, including 12 out of 15 bargaining unit employees, plus Tri-Star's service manager, Mickey Blank.

On August 17, Hession called Otero and informed him that Respondent had terminated Hession and Murray, as well as Tom Santoro (the nonunit part-time porter). Otero replied that he would try to speak with Siegel, but advised Hession to file a grievance, and have Murray file a grievance as well. Otero called Siegel on August 18. Otero asked Siegel if he had terminated Hession and Murray. Siegel replied that he hadn't fired anyone, he just didn't hire the two people. Siegel added that Mickey Blank had given Siegel a list of who he needed, and these two were not on the list. Otero asked Siegel if he would put Murray and Hession back to work. Siegel said no.

[11] In fact, Blank subsequently found Esmond two jobs in the next year and a half.

Otero asked Siegel if Respondent intended to honor or recognize the Union's contract. Siegel responded that Respondent did not have to recognize the contract, because the contract had been set aside by the bankruptcy court, prior to the closing. Otero concluded the conversation by stating that he would speak to his lawyer.

Also on or about August 18, Hession came to the facility with a written grievance to present to Blank. The grievance which was dated August 18, states that Hession wants his job back because he ''was laid off out of rotation.'' Hession asked Blank for a written response. Blank replied that he needed some time to prepare a response and asked Hession to come back in a few days.

Several days later, Hession returned and asked Blank for a written response. Blank answered that he had spoken to his superiors at Metro, and been instructed that since Hession was never a Metro employee, it never let him go, and need not file a response to Hession's grievance.

In early September, Murray submitted a written grievance to Blank dated September 1 and asked for a reply. The grievance asserted that he was laid off on August 19 despite his long years of service. Blank responded to Murray as he had to Hession, that Metro was now the employer and because Tri-Star is out of business, no reply is necessary.

On August 20, Otero, on behalf of the Union, sent a letter to Respondent by certified mail. The letter confirms the conversation between Siegel and Otero, wherein Siegel agreed to abide by the contract with the Union, but with certain modifications. Otero asserted the willingness of the Union to meet with Respondent to discuss any modifications of the contract, and suggested a proposed meeting date. Siegel denied ever seeing this letter before the instant proceedings.

The Union was unable to produce the green card or any other post office receipt for this letter. Testimony was however, adduced from the Union's office manager that the clerical employee who mailed the letter kept certified receipts in a box on her desk, and that when the Union moved its office in August 1993, this clerical employee discarded a large number of green cards from her desk. The office manager however, could not testify about which green cards were discarded, or whether a green card evidencing Respondent's receipt of the August 20 letter was included among those cards that the employee discarded.

Respondent never replied to the Union's August 20 letter. On August 31, the Union filed the instant charge, alleging that Respondent violated Section 8(a)(1), (3), and (5) of the Act, including an allegation that Respondent refused to recognize and bargain with the Union as an alter ego and/or successor to Tri-Star. Shortly thereafter, according to Siegel, several employees came to him and stated that they had heard that the Union filed an unfair labor practice charge, and asked Siegel if it was true and what effect does it have on the employees. Siegel responded that, as far as he was concerned, the bankruptcy court set aside the contract with Local 447 and ''there is no Union.'' The employees then responded, according to Siegel, that they didn't ''want Local 447 here.'' Siegel, on cross-examination, conceded that in his view the setting aside of the Tri-Star contract by the bankruptcy court meant that Metro would no longer have to deal with Local 447, and that the Union was no longer on the scene. Siegel further elaborated that he refused Otero's request to honor the contract, because ''Local 447 had no contract with Metro. They, therefore, no longer represented the men because Metro had nothing to do with 447. Metro never had anything to do with 447.''

Also in late August, Hession testified that he made another visit to Metro's facility to discuss conversion of his health insurance. According to Hession, he had another conversation with Blank at that time. Hession asserts that he asked Blank what kind of recommendation he would give him. Hession claims that Blank responded that he would give Hession ''two for one.'' When asked what he meant, Hession asserts that Blank responded, ''I will give you and John Otero.''

Blank unequivocally denies making this statement or anything like it to Hession and denies ever personally discussing recommendations with Hession. Blank testified, however, that Respondent did make attempts to place all three of the employees whom it did not retain at other jobs. As for Hession, Blank testified that one of his service writers, Jeff Chippendale, arranged with a Pontiac dealer that needed a ''go-for,'' and someone who can do P.D.I. work, to interview Hession. It was reported to Blank that Hession had spoken to the Pontiac dealer who was interested in hiring Hession, but that Hession had not returned the Pontiac dealer's calls.

Hession, on rebuttal, denied having any conversations with Blank about obtaining a job at any Pontiac or any other dealership. Interestingly, Hession did not deny having a discussion with other representatives of Metro about a job at another dealership, nor that he in fact interviewed at a Pontiac dealership, as a result of conversations with any representatives of Respondent.

On November 19, Joseph Pecora, a business agent for United Service Workers of America, Local 355 (Local 355), visited the facility. He spoke to the technicians during their lunch hour and solicited authorization cards from them. He received most of the cards back signed by the employees on that date and a few several days later. Respondent introduced into the record 12 signed authorization cards, allegedly from employees of Respondent. Ten were dated November 19, one was undated, and one was dated November 23. Thereafter, Local 355 sent a telegram to Respondent demanding recognition. Subsequently, a meeting was held in late November between Pecora, Siegel, and Larry Milman, Respondent's attorney. Pecora produced the cards that he had obtained and asserted that his Union was the majority representative of Respondent's employees, and he wished to negotiate a collective-bargaining agreement with Respondent on behalf of the men. Siegel looked at the 12 cards, saw that they were all names of Respondent's employees, and satisfied himself that Local 355 represented a majority of employees. Siegel then agreed to recognize Local 355 and to meet to negotiate a collective-bargaining agreement.

As a result of negotiations between the parties, a collective-bargaining agreement was executed on January 1, 1993, by Pecora and Don Lia[12] on behalf of Respondent, which by its terms was effective from January 1, 1993, to December 31, 1995. The parties on February 19 executed a modification of that collective-bargaining agreement, which made certain changes in the existing contract.

[12] This was the first collective-bargaining agreement executed between Local 355 and any of Don Lia's dealerships.

Blank testified credibly, without contradiction, that after Respondent took over the operation, with a staff of 12 technicians, the amount of ''unapplied time'' for technicians disappeared.

III. ANALYSIS

A. *The Alleged 8(a)(3) Violations*

Whether Respondent's decision not to retain Hession and Murray is violative of Section 8(a)(1) and (3) of the Act must be evaluated under the standards of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

The General Counsel has the initial burden of establishing by a preponderance of the evidence that protected conduct was a motivating factor in Respondent's decision. If the General Counsel satisfies that burden, the burden of proof then shifts to Respondent to establish that it would have taken the same action, absent the protected conduct of the alleged discriminatees.

I am not persuaded that the General Counsel has adduced sufficiently probative evidence to meet its initial burden of proof that protected activities of either Hession or Murray were motivating factors in Respondent's decision not to retain them as employees.

While Hession was the shop steward for Tri-Star, and Respondent is charged with this knowledge, in view of the fact that Blank, Tri-Star's service manager, made the decision for Respondent on which Tri-Star employees it would retain, *Weco Cleaning Specialists*, 308 NLRB 310 (1992); *Kingswood Services*, 302 NLRB 247, 255 (1991), Hession's activities as shop steward were minimal. Thus, Hession never filed a grievance either with Crabtree or Tri-Star on behalf of the employees that he represented in all of his years as shop steward, since 1980. More significantly, the only grievance filed by employees where he became directly involved was in 1980, when Blank was not employed and when Crabtree was the employer. Indeed, Hession conceded in his testimony that relations between management and the Union had always been very good during his tenure as shop steward.

The General Counsel in this connection relies on Hession's testimony concerning Tri-Star's attempt to eliminate making medical payments in December 1991. At that time Hession protested Tri-Star's announced intention to do so, and complained about the matter to Otero, who eventually apparently persuaded Tri-Star that their contract did not permit such action.[13] I find the General Counsel's reliance on this incident to be misplaced. Initially, I note that Blank credibly denied that he was aware of this incident, and the General Counsel adduced no evidence that Blank knew about either Tri-Star's intent to eliminate medical benefits or the role of Hession or the Union in persuading Tri-Star not to do so. Moreover, even if one were to impute knowledge of these events to Blank, the Union's assistant shop steward, Sacarella, also complained to management of Tri-Star about the proposed reduction in benefits, and he was retained by Respondent. Thus if Respondent, by Blank, was motivated by these protected activities not to retain Hession, it would be logical that it would also have taken similar action against Sacarella, particularly where as here, it also failed to retain another employee, Murray who engaged in no union activities whatsoever. Additionally, this incident took place in December 1991, 8 months before Respondent's decision not to hire Hession. This in my view is too remote in time from the alleged discriminatory conduct to permit an inference that this protected conduct was a motivating factor in Respondent's August 1992 actions, especially in the absence of any evidence of animus by Respondent or by Blank toward Hession's activities in this regard.

The General Counsel also relies on a more current incident, the July 1992 decision of Tri-Star to eliminate dental benefits. The General Counsel points to the fact that Otero in his July 13 conversation with Siegel complained about the fact that dental benefits had been terminated. Therefore, General Counsel argues that at that point it became clear to Respondent that the Union would not be a pushover and would defend the interest of employees, and that it knew that Hession as the shop steward was the ''point man'' for the Union in the shop. I find the General Counsel's contentions in this regard to be speculative, unwarranted, and not supported by the record evidence.

While it is true that employees of Tri-Star did complain to Blank and to Otero about the loss of their dental benefits, there is no evidence whatsoever in the record that Hession, or Murray for that matter, was among those who complained to either Otero or Blank. More importantly, Blank himself was adversely affected by and upset about the loss of dental coverage, and he himself complained about the loss of coverage (for himself as well as the employees) to Chuck Wilk of Tri-Star. Therefore, I find it inconceivable that Blank who himself was upset about the loss of dental coverage, would somehow retaliate against Hession for his allegedly perceived but unproven role in enlisting Otero's support for the employees on this issue.

Thus, the General Counsel had adduced no evidence of any current or significant protected conduct engaged in by Hession or Murray, which might lead to the inference that such activity motivated Respondent's decision not to retain them.

The General Counsel's evidence of animus is similarly unimpressive. While Respondent was not exactly candid with the Union as to its intentions to honor the collective-bargaining agreement between the Union and Tri-Star, I cannot find that this conduct, even if it can be characterized as the General Counsel asserts as ''deception,'' is sufficient to warrant the inference that its hiring decisions were affected. I note that it is undisputed that Respondent left all hiring decisions, including the number and particular individuals to be retained, entirely in the hands of Blank. There is no record evidence that Blank was involved in or ever became aware of Respondent's ''deceptive'' conduct with regard to the contract, and I find it highly unlikely that he would have had such knowledge. Moreover, in fact Respondent hired 12 former Tri-Star employees who were all represented by the Union, and staffed its entire complement of technicians with such employees. Therefore, I cannot conclude that Respondent's deception in dealing with the Union constitutes sufficient evidence of animus to infer that the decision not to retain Hession or Murray was motivated by unlawful considerations.

[13] It is noteworthy that Otero furnished no testimony as to this incident.

Finally, the General Counsel relies on Hession's testimony that subsequent to the refusal to hire, Blank in a discussion with Hession about a reference, agreed to give Hession two references, one for him and one for Otero. Blank credibly and unequivocally denies making such a statement, and I tend to believe Blank's denial that he made such a remark. I found Blank to be a most credible and candid witness throughout most of his testimony. I note that at the time of the trial he was no longer employed by Respondent and was therefore the only witness who testified here who had no direct interest in the outcome of this proceeding. It also appeared to me that Blank was sincerely attempting to recount his recollection of events, without regard to whether or not such recollection would be adverse to Respondent's case. I note in this regard his candid admission that he did assure employees that they all would be retained by Respondent, even though he knew at the time that this was not the case. Additionally, he also conceded that although he had reviewed Murray's personnel file and was aware of several warning notices appearing therein, he did not consider these warnings in his decision not to retain Murray. Clearly, Respondent introduced these warnings in an attempt to bolster its contention that Murray was an unsatisfactory employee at Tri-Star, and it would have been easy for Blank to testify that these warnings were a factor in his assessment of Murray's performance. He did not do so, however, which convinces me even more that he was testifying truthfully about the basis for his selection of Hession and Murray as employees not to be retained.

Also, I carefully observed Blank while he was testifying, and I could see the anguish on his face when he testified about the ''tossing and turning'' in his sleep while he was making the final difficult decision to let go three employees. I found him to be most believable when he testified that it was not an easy decision for him to make because he had worked with these employees for many years, he himself had been out of work in the past, and it was not easy for him to tell someone to go home and tell their wife not to buy groceries.

Accordingly, for the above reasons, I credit Blank's testimony with respect to the alleged statement attributed to him by Hession, as well as with respect to Blank's testimony concerning his reasons for not retaining Murray and Hession.

Moreover, I also agree with Respondent that the alleged statement of Blank, even if credited, is too ambiguous to warrant the conclusion that it evidences significant antiunion animus. The remark can just as easily, as Respondent argues, be construed as a promise to supply an additional reference to Otero on behalf of Hession, so that Otero can use it to assist Hession in his search for work. This interpretation is in fact strengthened by the credited testimony of Blank that Respondent did in fact make efforts to assist all three employees whom it did not retain, including Hession, to obtain other employment.

Therefore, I conclude that the General Counsel has not presented any evidence that Hession engaged in any current union activities of which Respondent was aware, or that Respondent has any animus towards any protected conduct of Hession. While Respondent was aware that Hession was the shop steward for the Union, and Respondent did engage in some deceptive conduct toward the Union, I do not find that these events, singly or collectively, are sufficient to draw an inference that Respondent's hiring decisions were motivated in any way by such facts. I also reemphasize that Respondent hired 12 former Tri-Star employees, who were represented by the Union, including Assistant Shop Steward Sacarella, who engaged in the same union activities as Hession, insofar as this record discloses. Thus, I do not believe that the General Counsel has established that any real or perceived protected conduct of Hession played any role in Respondent's decision not to retain him as an employee.

The General Counsel's case with respect to Murray is even less persuasive. Admittedly, Murray was not a shop steward, held no other union position, and engaged in no protected conduct whatsoever. The General Counsel argues, however, that Murray was chosen to be laid off to ''cover up'' Respondent's unlawful discrimination against Hession, even though Murray himself engaged in no such union activities. *Jack August Enterprises*, 232 NLRB 881, 898, 900 (1977).

Since I however, have found above that the General Counsel has not met its burden of establishing that any protected conduct of Hession was a motivating factor in Respondent's decision not to retain him, it follows that its ''cover up'' contention with respect to Murray's status must also meet a similar fate. Accordingly, I also conclude that the General Counsel has failed to prove that any protected conduct of Murray or of Hession played any role in Respondent's decision not to retain Murray as an employee.

Assuming arguendo that I were to conclude that the General Counsel has established that protected conduct were motivating factors in Respondent's decision with respect to the retention of Hession and Murray, I would find that Respondent has met its burden of establishing that it would have taken the same action absent the protected activities involved. *Wright Line*, supra.

While the General Counsel is correct that Respondent adduced no records to establish its contention that financial losses motivated its decision to reduce its staff of technicians, I do not find this failure to be significant, particularly in view of the mutually corroborating and credible testimony of Siegel and Blank that they both concluded that Tri-Star was overstaffed with technicians. Moreover, I note that Tri-Star was in bankruptcy, was losing substantial amounts of money,[14] and that in addition to not retaining Hession and Murray, Respondent also failed to retain eight other former Tri-Star employees in various positions, including another bargaining unit employee, whom the General Counsel has not alleged to be a discriminatee.

Moreover, Blank's credible and unrefuted testimony establishes that the amount of ''unapplied time'' for technicians disappeared at some point after Respondent began operating with three fewer technicians.

With respect to the specific decision not to retain Hession or Murray, I find that Respondent has persuasively established that the selection was made based on Blank's evaluation of the technical abilities of these employees. While the General Counsel relies on the fact that Hession and Murray were the two most senior technicians, I note that Respondent as a new employer had no obligation, even as a successor to Tri-Star, to follow the seniority clause in the contract be-

[14] Indeed, normally employers do not file for bankruptcy unless they are in financial difficulty.

tween Tri-Star and the Union. *NLRB v. Burns International Security Services*, 406 NLRB 272 (1972). While Respondent was somewhat deceptive in its dealing with the Union, it was consistent and honest in informing the Union that it had problems with the seniority clause in the contract. Moreover, Respondent also failed to retain, based also on Blank's decision, Tom Santoro who had over 50 years of seniority at the facility, many more years of service than either Hession or Murray. This action is fully supportive of Blank's credible testimony that his decision on which employees to retain was based not on seniority, or union activities, but solely on his assessment of which employees Respondent needed to operate efficiently.

In that connection, Blank's unrefuted and believable testimony establishes that Hession, although he was an ''A'' mechanic, was not performing and was not capable of performing skilled mechanics' functions that such a classification requires. Hession performed only unskilled P.D.I. work and oil changes. It is noteworthy that Hession, although called as a rebuttal witness on other matters, did not refute Blank's testimony on this point.

The General Counsel makes much of the fact that, although Blank testified about his low opinion of Hession's skills, Blank never warned Hession about his performance or reduced his classification to a B or C mechanic. This conduct is effectively explained, however, by Blank's unrefuted and credible explanation as to the history of Hession's employment. Thus, Hession was employed as a limo driver for Crabtree's owner for much of his tenure while employed by Crabtree, and therefore lost touch with working on cars. When Crabtree sold the business to Tri-Star, Watson, the owner of Tri-Star, agreed to Crabtree's request to retain Hession, along with two other longtime Crabtree employees, Santoro and Conley.

Thus, when Blank returned to work for Tri-Star as service manager in January 1991, he questioned Tri-Star's management about what Hession was doing in the shop and why he was classified as an ''A'' technician. Notwithstanding the fact that Tri-Star officials explained to Blank the above-described arrangement between Watson and Crabtree, Blank made several recommendations during 1991 to his Tri-Star superiors that Hession either be terminated or reduced in, grade because he was not performing skilled mechanics work, but his recommendations were not followed. At one point, pursuant to a suggestion from a Tri-Star official, Blank asked Hession to attend Toyota school to take courses in brakes and suspensions in order to improve his skills. Hession refused Blank's offer, however, and agreed only to attend school for P.D.I. work, which Toyota does not offer and which would not in any event provide Hession with experience performing class A mechanics' work.

Therefore, when Respondent entrusted the decision of which and how many Tri-Star employees to retain to Blank, Blank was not bound by Watson's agreement with Crabtree to keep Hession on and was free to use his own best judgment about which employees were most qualified and most needed.[15] I conclude that Respondent has established that Blank exercised such judgment by selecting those employees who he felt were the most capable and most essential to operate the service department.

While Blank did not testify as to any past dissatisfaction on his part with Murray's performance and, as noted by the General Counsel, never warned Murray that his abilities were not satisfactory, these facts do not detract significantly from my conclusions set forth above with respect to Blank's decision. I note initially that as I observed above, Murray's case is based on a ''cover up'' theory that he was chosen to be laid off in order to mask the alleged discriminatory termination of Hession. Because I have concluded above that Respondent has convincingly demonstrated that it did not retain Hession, because Blank believed (based on unrefuted and substantial evidence) that Hession was not a skilled mechanic, its burden of proof with respect to Murray is substantially lessened. Indeed, absent a finding that Hession was discriminatorily treated by Respondent, there is no basis in this record for finding that Murray was unlawfully laid off or not retained.

The General Counsel also relies on the wage increase that Blank approved for Murray in January 1991, which Tri-Star's form characterized as a merit increase. I find, however, that Blank has adequately explained his actions in that regard, because it is undisputed that Murray received this increase only weeks after Blank returned to Tri-Star as service manager. Thus, I believe Blank's testimony that his decision to recommend a raise for Murray was not based on any evaluation of his ability, but merely because Murray asked and that Blank discovered that Murray had not received a raise in the past 2 years, while everyone else in the shop had received an increase during that period of time.

Therefore, I conclude that although Blank had never criticized or warned Murray about his work performance, or recommended that he be terminated, that Blank believed as he testified, that relative to the other technicians, Murray was on the low end of the competency scale. Thus, once Blank decided that Respondent could operate efficiently with 12 technicians, he was required to decide which 3 employees not to retain. I am persuaded that he made such a decision after consultation with his service writers, and after much soul searching, based on his evaluation that Hession, Murray, and the third unit employee, Esmond, were the least skilled technicians amongst Tri-Star's employees.

Therefore, I conclude that Respondent would have met its burden of establishing that it would have taken the same action against Hession and Murray, absent any protected conduct, even if the General Counsel had met its initial burden of proof. Accordingly, based on the foregoing, I find that the General Counsel has not established that Respondent's decision not to hire or retain Hession or Murray was motivated by any protected conduct, and was not violative of Section 8(a)(1) and (3) of the Act. I shall therefore recommend dismissal of these allegations of the complaint.

B. *The Alleged 8(a)(5) Violations*

There can be little dispute that all the requisites for the establishment of an obligation on the part of Respondent to recognize and bargain with the Union under the principles of

[15] It is significant in this regard that Blank also let go Santoro, who as noted had much more seniority than Hession, and whose employment with Tri-Star had also been requested by Crabtree, and agreed to by Tri-Star, when the dealership was purchased by Tri-Star.

Burns, supra, are present in the instant case. It is undisputed that the Union has been the longtime collective-bargaining representative of Tri-Star's service shop employees, that Respondent purchased the assets, facilities, equipment, and supplies of Tri-Star, that Respondent continued to operate the business of Tri-Star in essentially the same fashion, with no hiatus in time, and that Respondent's work force consisted of a majority (in fact 100 percent) of former Tri-Star employees.[16]

The only requisite for establishing successorship that Respondent disputes here is the requirement that the Union make an appropriate demand for recognition. Respondent, while conceding that the Union made at least two requests that Respondent honor or recognize its collective-bargaining agreement with Tri-Star, contends that such a demand is not a proper demand for recognition. I do not agree.

A demand that a successor employer sign or honor a collective-bargaining agreement executed by the predecessor employer is a valid demand for recognition, because it contemplates and subsumes a demand for recognition. *Stanford Realty Associates*, 306 NLRB 1061, 1066 (1992); *Sterling Processing Corp.*, 291 NLRB 208, 217 (1988). This is particularly so when, as here, the Union indicates that it is willing to be flexible and does not offer the contract on a take-it-or-leave-it basis. Thus on July 13, Otero requested that Siegel on behalf of Respondent honor and recognize the Union's contract. After Siegel tentatively agreed, but expressed reservations about the seniority clause, Otero replied that he would be willing to negotiate something to help him operate his business. Moreover, Siegel and Otero also discussed other terms and conditions of employment of the employees, such as vacation pay, a dental plan, as well as Respondent's plans to reinstitute a demo plan. In these circumstances, it is clear and I so find that the Union made an appropriate demand for recognition on July 13.

On August 18, Otero made another demand that Respondent honor or recognize the contract, in the course of the Union's protest to Respondent about its alleged termination of Hession and Murray. This constitutes a second proper demand for recognition by the Union. *Stanford Realty*, supra; *Sterling Processing*, supra.

Finally, the instant charge, which was filed on August 31 and alleges a refusal to recognize and bargain with the Union by the Union, is itself tantamount to a valid request for recognition. *Sterling Processing*, supra at 217; *Stanford Realty*, supra at 1066.

While the General Counsel alleges that a fourth proper demand for recognition was made in the Union's letter of August 20 to Respondent, I do not find it necessary to make such a determination. Inasmuch as Respondent denies receipt of this letter, and the Union has been unable to produce the green card evidencing that Respondent received the document, it is questionable whether or not sufficient evidence of its receipt has been adduced by the General Counsel. Because I have already concluded that the Union made three valid and appropriate demands for recognition, however, I see no need to, and I shall not decide, whether in fact Respondent received the Union's August 20 letter.

[16] The fact that Respondent acquired the assets of Tri-Star as a result of a bankruptcy proceeding does not change the applicability of *Burns* principles. *Derby Refining Co.*, 292 NLRB 1015 (1989).

Respondent also defends its admitted refusal to recognize the Union on several other grounds. Initially, it contends that Respondent had a good-faith belief that the Union abandoned the shop. Respondent argues that the Union made no efforts to collect dues or fund contributions, and that no grievances or requests for arbitrations were filed by the Union, noting particularly that Hession and Murray filed individual grievances with Respondent concerning their alleged terminations. It is undisputed, however, that Otero on behalf of these employees did protest to Respondent about the terminations of Hession and Murray and advised Hession to file a grievance over the matter. Once Siegel refused on August 18 to honor the contract and told Otero that the bankruptcy court had set aside the Union's agreement, it is not surprising that the Union did not thereafter file a grievance or request arbitration or make any efforts to collect dues or fund payments. Indeed, Siegel admitted that, in his view, the setting aside of the Union's contract relieved Respondent of any bargaining obligation he might have had toward the Union. Therefore, Respondent's assertion that the Union abandoned the shop is totally unwarranted and provides no defense to its refusal to recognize and bargain with the Union.

Respondent also contends that it is relieved of any obligation to bargain with the Union because of its subsequent allegedly lawful recognition of Local 355, which was supported by authorization cards signed by a majority of employees in the unit. It is interesting to note that while Respondent vigorously pursued this theory at the trial and, in fact, presented evidence, over the objection of the General Counsel, of the circumstances of its recognition of Local 355, it made no reference to this purported defense in its brief. This is probably because the General Counsel, after the evidence was presented, asserted that as a remedy for the 8(a)(5) violation would be seeking to set aside Respondent's recognition of and contract with Local 355. Because the defense has not been withdrawn by Respondent, however, I shall consider it and reject it as being without merit.

The Union made three appropriate demands for recognition of Respondent months before Local 355 appeared on the scene or obtained any authorization cards from employees of Respondent. Therefore, by refusing to recognize and bargain with the Union well before any employee dissatisfaction with the Union surfaced, Respondent has undermined the Union's majority status and tainted any subsequent employee expressions of disaffection with the Union's representation of such employees. *Worcester Mfg.*, 306 NLRB 218, 220 (1992); *Sullivan Industries*, 302 NLRB 144, 149 (1991); *Manna Pro Painters*, 304 NLRB 782, 783, 788 (1991); *Bay Area Mack*, 293 NLRB 125, 131 (1989). See also *Fall River Finishing Co.*, 482 U.S. 27 (1987), where the Supreme Court observed:

> Once it has been determined that an employer has unlawfully withheld recognition of an employees' bargaining representative, the employer cannot defend against a remedial bargaining order by pointing to an intervening loss of employee support for the union when such loss of employee support is a foreseeable consequence of the employer's unfair labor practice. [482 U.S. at 51 fn. 18.]

While as detailed above, I agree with the General Counsel's assertions that NLRB law, of which I am bound, re-

quires that Respondent's purported defense of loss of majority be rejected, I note that *Sullivan*, supra, on which the General Counsel has placed significant reliance, has been denied enforcement and remanded to the Board in pertinent part by the Court of Appeals for the D.C. Circuit in *Sullivan Industries v. NLRB*, 957 F.2d 890 (1992). In my view, however, the instant case is distinguishable from *Sullivan*, and even under the analysis of the court of appeals, would result in a finding that the Respondent's refusal to recognize the Union tainted any subsequent loss of majority support as evidenced by the execution of authorization cards by employees on behalf of Local 355.

Thus the panel decision (Judge Silberman dissenting) disapproved of the Board appearing to apply a ''per se'' rule that in a successorship situation, any refusal to recognize the union that formerly represented the predecessor's employees taints any subsequent evidence of employee disaffection of the union, regardless of the totality of the circumstances, and without an examination of the factors that the Board normally relies on in determining whether a casual connection exists between unfair labor practices and the union's loss of majority. Id. at 899, 900, 901. The court therefore remanded the portion of the case that ordered the employer to bargain with the union, to the Board to either explain whether it has such a ''per se'' rule, and if so the reasons for it, or if not to explain why the refusal to recognize the union therein had a meaningful effect on employee support for the union and thereby tainted the petition. Id. at 902.

The key distinguishing factor between the instant matter and *Sullivan* supra, however, is the absence of any agreement by Respondent here to recognize the Union. Thus, the court in *Sullivan* emphasized the fact, that unlike Board precedent such as *Bay Area Mack*, supra, and *Manna Pro*, supra, the employer in *Sullivan* at all times acknowledged its obligation to recognize and bargain with the union as soon as it reached a representative complement of employees, and in fact actually did recognize the Union, albeit for only a day or two, before the employee petition was received and the subsequent withdrawal of recognition. The opinion considered this distinction quite significant, and suggested that it might be reasonable to infer that in the context of a persistent refusal to recognize a union, that the failure to recognize is the predominant factor in causing employee disaffection from the union. Id. at 902 and 901.

While there is some evidence that Respondent tentatively agreed to recognize the Union on July 13, when Siegel agreed to honor the contract, except for the seniority clause, I have found that Respondent never intended to recognize the Union, and that Siegel made a tentative agreement only to forestall possible union intervention in Tri-Star's attempt to set aside the union contract.[17] Moreover, any doubts about Respondent's intentions were clearly demonstrated by Siegel's statements made on August 18 to Otero that the Union's contract with Tri-Star had been set aside, and Siegel's admission that, as a result, he considered the Union's status as bargaining agent for the employees to be terminated. Indeed, Siegel communicated that position to several employees shortly after the Union filed its charge on August 31 when he told them that the court had set aside the contract and ''there is no Union.''

Therefore, even under the court's analysis, in *Sullivan*, Respondent's persistent refusal to recognize the Union for at least a 3-month period was sufficient to taint the employees' conduct in signing authorization cards for Local 355 in late November.[18] Accordingly, since I have rejected all of Respondent's defenses to its refusal to recognize and bargain with the Union, I conclude that Respondent has violated Section 8(a)(1) and (5) by its refusal to do so.

The General Counsel also alleges that Respondent's recognition of Local 355 in November was violative of Section 8(a)(1) and (5) of the Act and that to remedy that violation, it is appropriate to order Respondent to withdraw recognition from Local 355 and cease giving effect to the collective-bargaining agreement executed between Local 355 and Respondent.

Respondent argues that in effect the General Counsel is seeking to secure a finding that Respondent violated Section 8(a)(1) and (2) of the Act (and Local 355 Sec. 8(b)(1)(A)), without amending the complaint to allege such violations, and without affording due-process rights to Local 355, which was not made a party to this proceeding.

While Respondent is correct that this conduct would be violative of Section 8(a)(2) and/or Section 8(b)(1)(A), and is normally litigated in that context, with notice to the assisted Union, I agree with the General Counsel that I am not precluded from making such findings in an 8(a)(5) proceeding. In *U.S. Marine Co.*, 293 NLRB 669, 688 (1989), enfd. 916 F.2d 1183 (7th Cir. 1990), enfd. en banc 944 F.2d 1305 (7th Cir. 1991), an employer found to be a successor under *Burns* was found to have violated Section 8(a)(1) and (5) of the Act by unlawfully recognizing and bargaining with the union representing the predecessor's employees. The employer therein established a ''Safety and Progress Committee,'' which was found to be an employer-dominated labor organization. The administrative law judge found, affirmed by the Board without comment, that despite the absence of an 8(a)(2) allegation in the complaint, that the recognition of the committee as the representative of its employees interfered with employees' Section 7 rights, and was a violation of the employer's duty to bargain with the union in violation of Section 8(a)(1) and (5) of the Act.

As to Respondent's due process arguments, despite the absence of an allegation in the complaint that this conduct violated the Act, the issue was fully litigated at the hearing, was closely related to Respondent's refusal to bargain, and, in fact, it was Respondent who raised the matter as an affirmative defense. Moreover, at the hearing Respondent was notified by the General Counsel after Respondent introduced evidence concerning the recognition of Local 355 that it intended to seek as a remedy for Respondent's refusal to bargain the setting aside of Respondent's contract and bargaining relationship with Local 355. In these circumstances, there is clearly no prejudice to Respondent in finding such a violation or in issuing such a remedy. *Pergament United Sales*, 296 NLRB 333, 334–335 (1989).

[17] It is notable that the complaint does not allege that Respondent had voluntarily agreed to recognize or subsequently withdrew recognition from the Union. Rather, it merely alleges a refusal to recognize and bargain with the Union on and after July 13.

[18] My analysis of *Sullivan* has been confirmed by the Board in *Williams Enterprises*, 312 NLRB 937 (1993), where *Sullivan* was distinguished similarly.

Due process concerns vis-a-vis Local 355 are, however, more troublesome. In that connection, I note that Local 355 was not made a party in interest to this proceeding, not served with the complaint, and more importantly was not notified by the General Counsel that it intended to seek a remedy that would result in Local 355's contract and recognition being set aside.

I expressed my concerns at the hearing over the General Counsel's failure to so notify Local 355, when it announced its intention to seek a recession remedy, and requested that the issue be briefed. While I am still of the opinion that the better procedure would have been to either amend the complaint and/or to notify Local 355 of the General Counsel's intention to seek to set aside its contract, on balance I agree with the General Counsel that it is appropriate for me to make a finding that Respondent violated Section 8(a)(5) by recognizing and signing a contract with Local 355, and to remedy such violation by setting aside these actions.

I note initially, in agreement with the General Counsel that it is not always essential that any party adversely affected by a Board decision be notified or made a party to NLRB proceedings. See, for example, *Fibreboard Paper Products v. NLRB*, 379 U.S. 203 (1964), and *R.L. Sweet Lumber Co.*, 227 NLRB 1084, 1089 (1977), where the Board ordered employers to abrogate contracts with a subcontractor, even though the subcontractor was not made a party to and did not participate in the Board proceedings.

Moreover, I note that this proceeding was adjourned for a 10-day period so that Joseph Pecora, Local 355's business agent, could be present to testify. Thus, it is apparent that Respondent's counsel had contacted Local 355 and Pecora to determine his availability, and in fact Respondent called Pecora as a witness at the resumption of the hearing on November 19, 1993.

Since Pecora testified concerning Respondent's recognition of Local 355 and their execution of a collective-bargaining agreement, I conclude that Pecora knew or at least should have known that its status as bargaining agent for Respondent's employees was in issue and could have been adversely affected by this proceeding. Therefore, Local 355 could have chosen to make a motion to intervene in this proceeding to protect its interests in keeping its collective-bargaining agreement in force. Local 355 chose not to do so, however, apparently relying on Respondent to assert and protect their common interest in sustaining their collective-bargaining relationship.

Additionally, I also agree with the General Counsel that no prejudice has been demonstrated to Local 355, by the failure to notify it, since no contention has been made, that it was precluded from adducing any relevant evidence, which might have protected its status. Indeed, all the relevant evidence with respect to the recognition of Local 355 was litigated, and my findings that the recognition was unlawful was based solely on events that transpired in July and August, over 3 months before Local 355 appeared on the scene. Therefore, it is unlikely, if not inconceivable, that Local 355 could adduce any evidence that might change the result herein.

Finally, even absent an affirmative order to set aside Respondent's collective-bargaining relationship, such a result would be mandated by an order to bargain with Local 447, which is an appropriate and necessary remedy for the 8(a)(5) violation which was included in the complaint. Thus, Respondent cannot lawfully continue recognizing Local 355 while at the same time recognizing and bargaining with Local 447 as the representative for the same employees. It is noteworthy that in *U.S. Marine*, supra, the respondent employer was ordered to cease and desist from recognizing the dominated union, notwithstanding the fact that it does not appear that the ''Safety Committee'' had been made party to or notified about the proceeding.

Accordingly, based on all the above circumstances, I conclude that the failure of the General Counsel to either make Local 355 a party to the case, or to notify it that their status as bargaining agent for Respondent's employees was in issue, does not violate Local 355's due-process rights, and does not preclude me from affirmatively ordering Respondent to terminate their collective-bargaining relationship.

I therefore conclude that Respondent's conduct in recognizing and signing a collective-bargaining agreement with Local 355 in November interfered with its obligation to recognize and bargain with Local 447, and is violative of Section 8(a)(1) and (5) of the Act. *U.S. Marine*, supra, and can be remedied by an order to cease and desist recognizing Local 355, and to set aside their collective-bargaining agreement.

The General Counsel also alleges that Respondent has violated Section 8(a)(1) and (5) of the Act by refusing to bargain with Local 447 over its decision and the effects of the refusal to retain Hession and Murray as employees. In that connection, the General Counsel argues that Respondent's decision not to retain these employees, although technically a refusal to hire, was really more akin to a decision to reduce the size of the unit and to lay off employees, subjects over which it must bargain with the Union. *Lapeer Foundry & Machine*, 289 NLRB 952 (1988); *Challenge Cook Bros.*, 288 NLRB 387, 401 (1988). I agree.

While neither Hession nor Murray was ever on Respondent's payroll, in view of the circumstances surrounding its assertion of control over Tri-Star's operations, I conclude that Respondent's actions are more properly considered as a layoff or reduction in unit size. Respondent continued Tri-Star's operation without change and without a hiatus. More significantly, by the time Blank made the decision not to retain Murray and Hession on August 13, Respondent was fully in control of the facility. The contract was executed, amended, and approved by the bankruptcy court, all relevant licenses had been obtained, and the closing was scheduled for August 17. Moreover, Respondent's representative, Siegel, had been at the premises on a full-time basis for 3 months. Even more importantly, Blank, who as noted made the decision as to which and how many employees of Tri-Star Respondent would retain, referred to the action as a layoff, when he solicited the opinion of his service writers, and when he informed Hession, Murray, and Esmond of Respondent's decision.

Characterizing Respondent's decision not to retain the employees as a layoff or a reduction in size of the unit however doesn't end the inquiry. The more important question is when the bargaining obligation of Respondent attached. While generally in a successorship situation, the bargaining obligation arises when the new employer commences operations at the new facility and reaches a representative capacity, *Fall River*, supra, in certain circumstances a bargaining obligation may arise prior to employees being hired, ''where

it is perfectly clear that the new employer, plans to retain all of the employees in the unit.'' *Burns*, supra. The Board has applied this rationale to successorship situations, where the successor employer planned to hire a majority rather than all of the predecessor's employees, *Helnick Corp.*, 301 NLRB 128, 134 (1991), particularly where as here, the successor employer had exerted significant amounts of control over the operations of the predecessor prior to actually transferring employees to its payroll. *AJR Coating Co.*, 292 NLRB 148, 168 (1988); *Sorrento Hotel*, 266 NLRB 350, 356–357 (1983).

The General Counsel argues that Respondent's bargaining obligation attached on July 13, when the Union made its first demand. The General Counsel asserts that Respondent was a legally viable entity by that date. Thus, Respondent had entered into a purchase agreement with Tri-Star, which had been approved by the bankruptcy court, and all relevant licenses had been obtained by Respondent to operate the dealership. Moreover, Respondent had already informed Blank that it would be retaining him as service manager when it took over. Additionally, Siegel had been at the facility on a full-time basis for over 2 months. I agree with the General Counsel that Siegel's testimony that he was there only as an ''observer'' at the insistence of the bank is not convincing. Indeed, even Siegel's own testimonial admissions reveal that he exercised a much more significant managerial role during this interim period of time before the closing. Siegel conceded that he was there to ''make sure that things were taken care of on a day to day basis,'' and to make sure that ''whatever financial policies could be put in place to at least limit the loss that would take place.'' Siegel also admitted that the bank ''just wanted to know that an automobile person was there conducting business the way an automobile dealership should operate, not that it was haphazard.'' Also Siegel was paid by Respondent, reported regularly to Lia on his observations, and had no contact or communications with the bank. Finally, when Otero came to the premises on July 13 to discuss the dental plan, Blank directed him to Siegel as the new owner to discuss the problem. Siegel talked with Otero in what had formerly been the office of Tri-Star's vice president, informed Otero that Respondent would be taking over the dealership, and discussed with Otero whether or not Respondent would honor the Union's contract with Tri-Star, as well as other terms and conditions of employment of the unit employees.

Based on the above circumstances, I agree with the General Counsel that Respondent by July 13 was a viable entity, exercising de facto control over the facility, and was sufficiently viable to make labor relations decisions. Thus, the Union's demand was not premature. *Williams Enterprises*, 301 NLRB 167 (1991), enfd. denied and remanded in part but on other grounds 956 F.2d 1226 (D.C. Cir. 1992); cf. *Freemont Ford*, 289 NLRB 1290 (1988).

I however, do not agree with the General Counsel that Respondent's bargaining obligation attached on July 13, because the record does not establish that it had either decided to or informed employees that it would be hiring a majority of Tri-Star's employees by that date. I do agree with the General Counsel's alternative contention that the bargaining obligation attached in early August, after the discussion between Blank and Siegel, and Blank's meeting with employees. Thus, Siegel informed Blank at that time that the closing was scheduled for August 17, and confirmed his intention to retain Blank as service manager. As a result of their discussion, it was clear that as of that date, Respondent had concluded that 12 former Tri-Star technicians would be retained, and Blank would decide which employees to keep. Shortly thereafter, Blank met with the bargaining unit employees and informed them that Respondent would be purchasing the dealership, and that all employees would be retained, and everything including all benefits would be the same. After that conversation, I conclude that Respondent's bargaining obligation attached. *Helnick*, supra; *AJR Coating*, supra.

Respondent argues that no reliance should be placed on Blank's statements to employees about their being hired, since he was allegedly acting on the instructions of Watson, a Tri-Star official, in order to keep up the morale of employees so that they did not quit their jobs. While it is true, as Respondent argues, that the record does not establish that Blank spoke to the employees with Respondent's specific authorization, it is clear that as of that time Respondent had hired Blank as service manager and authorized him to make all decisions on the hiring of employees. In such circumstances, Respondent is responsible for Blank's statements and actions concerning the hiring of employees. *Weco Cleaning*, supra, 308 NLRB at 315. Moreover, I note that the same considerations and factors which allegedly motivated Watson to assure employees as to their status would inure to the benefit of Respondent. Respondent intended to fill its entire shop with Tri-Star employees, so it would obviously be in Respondent's interest to assure employees of their continued employment, so that they did not quit and accept other positions, because of fears that a new ownership would not retain them. Finally, even apart from Blank's statements to employees, Blank's conversation with Siegel in itself, made ''it perfectly clear'' that Respondent intended to hire a majority of unit employees from Tri-Star. *Burns*, supra.

Accordingly, I conclude that as of early August, Respondent was obligated to bargain with the Union as the collective-bargaining representative of its employees. As I have detailed above, the decision to lay off employees or to eliminate unit positions are mandatory subjects of bargaining, concerning which Respondent provide must give notice to and bargain with the Union concerning both the decision and the effects of such decisions. *Lapeer*, supra; *Challenge-Cook*, supra. See also *Plastonics, Inc.*, 312 NLRB 1045 (1993); *Tuskeegee Area Transportation System*, 308 NLRB 251, 252 (1991); *Consolidated Printers*, 305 NLRB 1061 (1992). Since Respondent's decision to lay off Hession and Murray was not made until August 13, well after its bargaining obligation attached, the failure to notify and bargain with the Union is violative of the Act. I note that the layoffs here were in violation of Tri-Star's longstanding practice, as set forth in its collective-bargaining agreement, of laying off by seniority. Thus, this action was particularly susceptible to the collective-bargaining process, and the Union was entitled to the opportunity to present alternatives to Respondent's decision to lay off employees and/or to do so without any consideration of seniority.

The fact that I have found above that Respondent's decision to lay off Hession and Murray was not based on discriminatory considerations in violation of Section 8(a)(1) and (3), and was made essentially for economic reasons, has no effect on Respondent's obligation to bargain with the Union

about these matters. As the General Counsel argues, the Union may have been willing to sacrifice wage increases or some other benefits, in order to save employees' jobs. Therefore, I conclude that by terminating Hession and Murray without consulting with the Union, and without having agreed on a procedure for layoffs, Respondent has refused to bargain with the Union in violation of Section 8(a)(1) and (5) of the Act.

Lapeer, supra; *Plastonics*, supra. See also *Kirby's Restaurant*, 295 NLRB 897, 901 (1989). Successor forfeited its rights to set initial terms and violated Section 8(a)(1) and (5) by unilaterally eliminating past seniority credit.

Finally, it can be alternatively argued that by Blank's announcement to the employees (which included the shop steward for the Union) that all of them would be hired without any changes in benefits, Respondent made a commitment to hire all employees or at least not to change existing seniority procedures, which commitment is binding, regardless of whether Respondent was obligated to assume the terms of Tri-Star's contract. *Double A Coal Co.*, 307 NLRB 689 fn. 2 (1992).

CONCLUSIONS OF LAW

1. Respondent N.R. Automotive, Inc., d/b/a Metro Toyota is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local Lodge 447, District Lodge 15, International Association of Machinists & Aerospace Workers, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Since on or about August 1992, the Union has been the exclusive collective-bargaining representative of Respondent's employees in the following appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment.

The unit is:

> All service shop employees (service technicians) employed by Respondent at its facility at 47 Cedar Street, New Rochelle, New York, excluding office clerical employees, new and used car salesmen, guards, watchmen, parts department employees, professional employees, and supervisors as defined by the Act.

4. By refusing to recognize and bargain with the Union on or after August 1992, by refusing to notify and bargain with the Union concerning its decision to lay off employees James Hession and Leonard Murray, and to reduce the size of the bargaining unit, and the effects of such decisions, and by its recognition of and signing a collective-bargaining agreement with United Service Workers of America, Local 355, Respondent has violated Section 8(a)(1) and (5) of the Act.

5. Respondent's termination of Hession and Murray was not violative of Section 8(a)(3) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has violated Section 8(a)(1) and (5) of the Act, I shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

I shall order Respondent to bargain on request with the Union concerning terms and conditions of employment of its employees, including Respondent's decision to lay off Murray and Hession and to reduce unit size, as well as the effects of such decisions. With respect to Hession and Murray I shall recommend that Respondent reinstate them to their former positions of employment and make them whole by paying them backpay from the dates of their layoff (August 17) until Respondent offers them reinstatement or until they have secured substantially equivalent employment elsewhere. *Lapeer*, supra at 955. Backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 389 (1950), with interest in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

As noted above, I find it appropriate to recommend that Respondent withdraw recognition from Local 355, and cease and desist from maintaining or enforcing any terms of the collective-bargaining agreement in effect between Respondent and Local 355. Nothing in my recommended Order however shall be construed to require Respondent to vary or abandon any wage increases or other benefits or terms and conditions of employment that it has established in performance of the agreement. *Jayar Metal Finishing Co.*, 297 NLRB 603 (1990).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[19]

ORDER

The Respondent, N.R. Automotive, Inc., d/b/a Metro Toyota, New Rochelle, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain with Local Lodge 447, District Lodge 15, International Association of Machinists & Aerospace Workers, AFL–CIO (Local 447) as the collective-bargaining representative of its employees in the appropriate unit described below:

> All service shop employees, service technicians employed by Respondent at its facility at 47 Cedar Street, New Rochelle, New York, excluding office clerical employees, new and used car salesmen, guards, watchmen, parts department employees, professional employees and supervisors as defined in the Act.

(b) Refusing to notify and bargain with Local 447 concerning its decision to lay off employees and to reduce the size of the unit and the effects of these decisions.

(c) Recognizing or bargaining with United Service Workers of America, Local 355 (Local 355) as the collective-bargaining representative of its employees in the above-described unit, unless and until Local 355 is certified by the NLRB as the exclusive collective-bargaining representative of an appropriate unit of its employees.

(d) Maintaining or giving any force or effect to its bargaining agreement with Local 355, or to any modifications extensions, or renewals thereof; provided, however, that

[19] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

nothing in this Order shall be construed to require the Respondent to vary or abandon any wage increases or other benefits or terms and conditions of employment that it has established in performance of the agreement.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, recognize and bargain with Local 447 as the exclusive representative of the employees in the unit set forth above concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) On request, bargain with Local 447 concerning Respondent's decision to reduce the size of the bargaining unit and to lay off employees James Hession and Leonard Murray as well as the effects of these decisions.

(c) Reinstate and make whole employees James Hession and Leonard Murray for any loss of pay or other employment benefits suffered as a result of its unlawful conduct in the manner set forth in the remedy portion of this decision.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its facility in New Rochelle, New York, copies of the attached notice marked ''Appendix.''[20] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that all violations alleged in the complaint, but not found, are dismissed.

[20] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to recognize and bargain with Local Lodge 447, District Lodge 15, International Association of Machinists and Aerospace Workers, AFL–CIO (Local 447) as the exclusive collective-bargaining representative of our employees in the appropriate unit described below:

> All service shop employees (service technicians) employed by us at our facility at 47 Cedar Street, New Rochelle, New York, excluding office clerical employees, new and used car salesmen, guards, watchmen, parts department employees, professional employees and supervisors as defined in the Act.

WE WILL NOT refuse to notify and bargain with Local 447 concerning our decision to lay off employees and to reduce the size of the unit and the effects of these decisions.

WE WILL NOT recognize or bargain with United Service Workers of America, Local 355 (Local 355) as the collective-bargaining representative of our employees in the above-described unit, unless and until Local 355 is certified by the NLRB as the exclusive collective-bargaining representative of an appropriate unit of our employees.

WE WILL NOT maintain or give any force or effect to our bargaining agreement with Local 355, or to any modifications, extensions, or renewals thereof; provided, however, that nothing be construed to require us or abandon any wage increases or other benefits or terms and conditions of employment that we have established in performance of the agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, recognize and bargain with Local 447 as the exclusive representative of our employees in the unit set forth above concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL on request, bargain with Local 447 concerning our decision to reduce the size of the bargaining unit and to lay off employees James Hession and Leonard Murray, as well as the effects of these decisions.

WE WILL reinstate and make whole employees James Hession and Leonard Murray for any loss of pay or other employment benefits suffered as a result of our unlawful conduct plus interest.

N.R. AUTOMOTIVE, INC., D/B/A METRO TOYOTA